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No. 08-1207

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# Supreme Court of the United States

GEOFFREY, INC.,
*Petitioner*,

v.

COMMISSIONER OF REVENUE,
*Respondent*.

**On a Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court**

## BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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## BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

## INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (herein-

[1] Pursuant to Rule 37.6, *amicus* Tax Executives Institute, Inc. states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for both parties received timely notice of the intent to file an *amicus* brief under this rule and both par-

after "TEI" or "the Institute") is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code (26 U.S.C.). The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and vindicating the Commerce Clause and other constitutional rights of all business taxpayers.

TEI has more than 7,000 members who represent more than 3,200 of the leading corporations in the United States, Canada, Europe and Asia, including many domiciled or doing business in Massachusetts. TEI members represent a cross-section of the business community whose employers are, almost without exception, engaged in interstate commerce. Because TEI members and the companies by whom they are employed will be materially affected by the Court's disposition of the constitutional issues raised by this case, the Institute has a special interest in this matter.

## SUMMARY OF ARGUMENT

The issue presented in this case is whether the Commerce Clause precludes Massachusetts and other States from taxing the income of a corporation whose presence in the State is not physical, but involves only the use of its trademark (or other intangible property) by a licensee. For the past 40

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ties have consented to its submission in letters filed with the Clerk.

years, taxpayers have relied upon the bright-line constitutional principle that an enterprise must have physical presence in a State before being subject to tax in that State. In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), the Court held that an interstate business without any physical presence in Illinois did not have a sufficient connection, or nexus, with the State to require the business to collect and remit use taxes on sales made to Illinois customers. Twenty-five years later, it affirmed that holding in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). There, the State of North Dakota challenged the continuing validity of the Court's holding in *National Bellas Hess* arguing that a physical presence standard no longer reflected the realities of an evolving marketplace so altered by changes in technology and other commercial innovations. This Court was unpersuaded. Noting the importance of adhering to precedent, the Court in *Quill* upheld the physical presence test, vindicating the Commerce Clause and simplifying tax administration for business taxpayers and tax administrators. The intervening decade and a half has brought numerous challenges to the physical presence standard, the most recent one being this case.

1. The Massachusetts Supreme Judicial Court concluded that "substantial nexus can be established where a taxpayer domiciled in one State carries on business in another State through the licensing of its intangible property that generates income for the taxpayer." *Geoffrey, Inc. v. Massachusetts Department of Revenue*, 453 Mass. 17, 23 (2009). The lower court based that decision on its opinion earlier that same day in *Capital One Bank v. Commissioner of Revenue*, 453 Mass. 1 (2009), where it construed the "substantial nexus" standard in *Complete Auto Transit, Inc. v.*

*Brady*, 430 U.S. 274, 279 (1977), to vitiate the physical-presence standard articulated in *National Bellas Hess* and reaffirmed in *Quill*.[2]

2. Concluding that *Complete Auto Transit* and *Quill* establish differing nexus standards -- with the former overruling the latter – is simply wrong. In formulating its four-prong test for determining whether a state tax statute violates the Commerce Clause, the Court in *Complete Auto Transit* harmonized its decisions from earlier cases. Indeed, the first prong of the *Complete Auto Transit* test requiring substantial nexus was expressly based on the Court's previous holdings, which include *National Bellas Hess*. The Court's later holding in *Quill* did not produce a new or different standard; it affirmed and vivified the existing standard – physical presence in a State.

3. The Massachusetts court misapprehended this Court's decisions in *Quill*, *Complete Auto Transit*, and *National Bellas Hess* in other important respects: First, it erroneously concluded that the bright-line, physical presence test embraced by the Court for Commerce Clause purposes has no application in respect of income taxes. Moreover, by conjuring nexus between a licensor and the State from a *licensee*'s use of a trademark, the lower court set forth a standard so open-ended – so untethered to principle – that it can only subvert the core purpose of the Commerce Clause.

Massachusetts is not alone in its attempt to expand its tax base by chipping away at the physical pres-

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[2] The *Capital One* case is also before the Court. *See Capital One Bank v. Commissioner of Revenue*, 453 Mass. 1 (2009), *petition for cert. filed* (March 19, 2009) (08-1169).

ence test. Numerous other States have striven to legislatively, judicially, or administratively diminish *Quill* and *National Bellas Hess* by asserting that they apply solely to sales and use taxes. They make this claim even though this Court has never permitted the imposition of a state tax upon a nonresident enterprise without some in-state physical presence.

4. Making matters worse, the amorphous nexus standards conjured by the States provide near complete discretion to the States in making nexus determinations. This growing lack of clear and objective standards threatens the ability of all businesses – no matter how small and no matter where located – to engage in interstate commerce without the imposition of undue burdens. If the reliance interests of multistate businesses are to be reordered by a standard other than that defined in *Quill* and *National Bellas Hess*, that change should be effected by Congress exercising its plenary power under the Commerce Clause.

## ARGUMENT

### I. BACKGROUND

In 1984, Toys "R" Us, Inc. formed the petitioner, Geoffrey, Inc., under Delaware law as a wholly owned subsidiary to hold several trade names, service marks and trademarks, including "Toys 'R' Us" and the Geoffrey the Giraffe character. Geoffrey, Inc. ("Geoffrey") licensed those intangible assets to affiliated companies and to certain third parties located throughout the United States. The license agreements provided for market-rate royalties for the use of Geoffrey's intangible assets.

In Massachusetts, Geoffrey licensed its trade names and trademarks to two affiliated entities: Toys "R"

Us-Mass, Inc. ("TRUMI") and Baby Superstore, Inc. TRUMI operated retail stores located in Massachusetts and Baby Superstore operated retail stores across the United States including Massachusetts through its Babies "R" Us division. In return for the right to use its intellectual property, TRUMI and Baby Superstore remitted royalty payments to Geoffrey based on their net sales.

Geoffrey itself had no property or employees located in Massachusetts. Additionally, Geoffrey never used state or federal courts located in Massachusetts. The only connection Geoffrey had with Massachusetts was the licensing of its trademarks and trade names to TRUMI and Baby Superstore for use at stores located in Massachusetts.

During an audit of TRUMI's Massachusetts corporate excise tax return, the Massachusetts Department of Revenue initiated a nexus investigation into Geoffrey's activities in Massachusetts. It did not challenge that Geoffrey was formed for a valid business purpose or had economic substance. After analyzing Geoffrey's activities, however, the Department determined that Geoffrey was subject to the corporate excise tax as a result of its "economic presence" in the Commonwealth. Geoffrey appealed this determination to the Massachusetts Appellate Tax Board. Finding that so-called economic presence alone created nexus in the Commonwealth, the Board found in favor of the Department. Geoffrey appealed this decision, and the Massachusetts Supreme Judicial Court affirmed.

## II. THE COMMERCE CLAUSE REQUIRES PHYSICAL PRESENCE BEFORE A STATE CAN IMPOSE A TAX ON INTERSTATE BUSINESSES

The core issue presented is whether TRUMI's and Baby Superstore's use of Geoffrey's intangible property in Massachusetts subjected Geoffrey to income tax in the Commonwealth. The Massachusetts court boldly asserts the answer is yes, contending that taxpayers cross the Commerce Clause's nexus threshold by merely licensing intangible property to persons in Massachusetts. *Geoffrey, Inc. v. Massachusetts Department of Revenue*, 453 Mass. 17, 23 (2009). Thus, it vitiated existing Commerce Clause restraints by holding that nexus for state income taxes "is determined not by *Quill*'s physical presence test, but by the 'substantial nexus' test articulated in *Complete Auto*." *Id.* at 18 (citing *Capital One Bank*, 453 Mass. at 15 (2009)). The holdings of the Massachusetts court in *Capital One* and the instant case cast an ominous shadow over the protections accorded interstate businesses by the Commerce Clause of the Constitution.

The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.[3] The "fundamental purpose" of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State*

[3] "Although the language of th[e] Clause speaks only of Congress' power over commerce, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Dennis v. Higgins*, 498 U.S. 439, 446 (1991) (internal quotation omitted).

*Tax Commission*, 429 U.S. 318, 335 (1977). In tandem with the Due Process Clause of the Fourteenth Amendment, the Commerce Clause acts to prevent the States from enacting unfair tax or tax collection statutes and thereby imposing "unreasonable clog[s] upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court established a four-prong test for determining whether a state tax statute violates the Commerce Clause – that is to say, whether it impermissibly reaches extraterritorial values. Specifically, a tax will be sustained only if (1) it is applied to an activity with a substantial nexus with the taxing State, (2) it is fairly apportioned, (3) it does not discriminate against interstate commerce, and (4) it is fairly related to the services provided by the State. *Id.* at 279. The Court noted that it was not breaking new constitutional ground in articulating its four-pronged test. Rather, it merely synthesized extant Commerce Clause jurisprudence as it related to state tax systems. *Id.* at 279.

One progenitor of the substantial nexus prong of the *Complete Auto Transit* test was the Court's 1967 decision in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), in which it held that a sales and use tax violated the Commerce Clause to the extent it was imposed on a vendor whose only contacts with the taxing State were through the mail and by common carrier.[4] The Court

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[4] The Court also reasoned that the administrative and record-keeping requirements that could arise in the absence of a physical presence test "could entangle National [Bellas Hess]'s inter-

explained that permitting the imposition of a use tax collection duty on a business that maintained no physical presence in the State would give rise to "unjustifiable local entanglements" of interstate commerce. *Id.* at 760. Evaluating earlier cases, the Court noted it had "never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail [*i.e.*, without physical presence in the State]." *Id.* at 758. That remains true today.

Twenty-five years after *National Bellas Hess*, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court again grappled with the question whether physical presence was required before a State could constitutionally impose a use tax collection obligation on an out-of-state enterprise. The State of North Dakota argued that the physical presence standard had outlived its usefulness, its obsolescence caused by "tremendous social, economic, commercial, and legal innovations" since *National Bellas Hess* was decided in 1967. *North Dakota v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991). The Court declined, however, North Dakota's invitation to cast aside more than 25 years of precedent simply because States found the economic effects of the Commerce Clause not to their suiting. Indeed, *Quill* confirmed the vitality of the *Complete Auto Transit* construct and effectively harmonized that decision with the Court's 1967 decision in *National Bellas Hess*. It also reaffirmed the constitutional prerequisite of the taxpayer's physical presence in the taxing jurisdiction. *Quill Corp.*, 504 U.S. at 317.

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state business in a virtual welter of complicated obligations to local jurisdictions . . . ." *Id.* at 759-60.

Thus, *Quill* vivified the principle that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the substantial nexus required by the Commerce Clause. The Court embraced *National Bellas Hess*'s bright-line physical-presence test of Commerce Clause nexus not only because such a test "furthers the ends of the dormant Commerce Clause" by "demarcati[ng] . . . a discrete realm of commercial activity that is free from interstate taxation," *id.* at 315, but because it fosters the "interest in stability and orderly development of the law" that undergirds the doctrine of *stare decisis*. *Id.* at 315 (quoting *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring).[5] The Court in *Quill* did not explicitly extend its holding beyond the sales and use tax area, but it cautioned that its declining to articulate a physical-presence test in other areas "does not imply repudiation of the [*National*] *Bellas Hess* rule" in those areas. *Id.* at 314.

The similarities between this case and *Quill* are striking. As was the case with the North Dakota Supreme Court in *Quill*, the Massachusetts Supreme Judicial Court in the instant case has brushed aside years of binding precedent on a results-oriented quest to constrict the Commerce Clause. Mimicking the brash approach of North Dakota's Supreme Court, Massachusetts here argues that the physical presence standard should no longer apply to income taxes, intimating that advancements in technology and evolution of the interstate market have rendered

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[5] "[T]he continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate the [*National*] *Bellas Hess* rule remains good law." *Quill Corp.*, 504 U.S. at 317.

the physical presence test obsolete.[6] Indeed, the Commonwealth effectively argues that the bright-line physical presence test outside of the sales and use tax context should be jettisoned simply because it does not like the results when that standard is applied to the licensing of intangible assets to persons in Massachusetts.[7]

The approach taken by Massachusetts was born of its frustration with the restrictions imposed by the Commerce Clause to minimize burdens on interstate commerce. Other States too have sought to jettison physical presence as the *sine qua non* for nexus in favor of an elastic economic nexus standard that defies practical and predictable application. In fact, the Massachusetts court justified its decision, in part,

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[6] At the time *Quill* was decided, 36 States had enacted legislation essentially disregarding this Court's holding in *National Bellas Hess*. While some statutes were contingent on intervening federal legislation or other federal authority, others flew in the face of this Court's precedents. Alabama, for example, deemed the U.S. Postal Service to be the seller's agent, even though *National Bellas Hess* clearly states that the use of common carriers or the mails does not provide sufficient nexus for Commerce Clause purposes. 386 U.S. at 758; *see* Alabama Code § 40-23-1(a)(5) (Supp. 1990).

[7] Massachusetts has made several attempts to collapse intercompany transactions between in-state and out-of-state enterprises. The Massachusetts Department of Revenue issued Directive 96-2 on July 3, 1996 informing taxpayers of its view that out-of-state corporations receiving royalties from in-state licensees are subject to the corporate excise tax. Massachusetts Department of Revenue, Directive 96-2 (July 3, 1996). In 2003, the Massachusetts legislature enacted related party "add-back" provisions that deny deductions for certain royalty and interest payments made by Massachusetts taxpayers to affiliated entities. *See* Mass. Gen. Laws ch. 63, §§ 31I and 31J (effective for tax years beginning on or after January 1, 2002).

by saying "everybody else is doing it": "In reaching this conclusion, we join other jurisdictions that have considered the physical presence issue in the context of intangible property and have upheld the imposition of income-based tax assessments." *Geoffrey*, 453 Mass. at 23-24. Without analysis, the court summarily dismissed the well-reasoned opinions of state courts that have followed established precedent by concluding physical presence remains the standard for state tax Commerce Clause nexus inquiries. *See, e.g., Guardian Industries Corp. v. Department of Treasury*, 499 N.W.2d 349, 353 (Mich. Ct. App. 1993); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. Ct. App. 2000); *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999).

In dismissing *Quill*, the Massachusetts court gave short shrift to a basic principle of constitutional adjudication: It is this Court that prescribes constitutional standards and the lower courts are obliged to adhere to those standards. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). The decision below thus stands not only as a repudiation of the bright-line test set forth in *Quill*, but as an affront to the Court itself.

In *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972), Justice Blackmun gave voice to the Court's well-founded unwillingness to interfere with commercial relationships developed in reliance upon a decision of this Court. "If there is any inconsistency or illogic in all this," he wrote for the Court, "it is an inconsistency and illogic long standing that is to be remedied by Congress and not by this Court." *Id.* at 284. It certainly is not to be "remedied" by inferior courts in defiance of this Court's holdings in *National Bellas Hess* and *Quill*.

*Amicus* TEI respectfully suggests that if *National Bellas Hess* and *Quill* are to be dispatched – if the commercial relationships developed in reliance upon those decisions are to be upended – it is for Congress to decide. "[O]nly Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that [will] guarantee the States fair revenues and offer interstate business freedom from strangulation by multiple paperwork and tax burdens." *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 331 (1982) (O'Connor, J., with Blackmun & Rehnquist, J.J., dissenting).

Justice Frankfurter explained the quandary confronting the Court in his dissenting opinion in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959):

> At best, this Court can only act negatively . . . . We cannot make a detailed inquiry into the incidence of economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power.

*Id.* at 476 (Frankfurter, J., dissenting).

Significantly, Congress exercised its legislative authority in the aftermath of the Court's decision in *Northwestern States Portland Cement*, enacting Public Law No. 86-272, 73 Stat. 555 (1959) (codified at 15 U.S.C. § 381 (1988)). *Amicus* TEI submits that if, after over 40 years, the standard enunciated in *National Bellas Hess* is to be modified, that decision belongs to the national legislature. Indeed, Congress's failure to enact such legislation – notwithstanding repeated attempts – underscores the impropriety of the decision below and why the reliance interests of taxpayers should not be upended by overturning long established precedent.

## III. STATES ARE BOUND BY COMMERCE CLAUSE LIMITATIONS RESULTING FROM TAX POLICY CHOICES MADE BY STATE LEGISLATURES

The decision below is a consequence not of an antiquated constitutional standard, but of the tax policy choices made by the Massachusetts legislature.

Within boundaries established by the Commerce Clause and Due Process Clause, a State is free to construct its own taxing system. U.S. Const. art. I, § 8, cl. 3 and U.S. Const. amend. XIV, § 1. Some States have chosen to adopt taxing regimes under which a taxpayer's entire unitary group of corporations is required to be included in a single combined corporate tax report. *See e.g.*, California (Cal. Rev. & Tax Code § 25101); Maine (Me. Rev. Stat. Ann. § 5220(5)). Under a unitary combined system, all members of a unitary group of taxpayers (including those without nexus in the State) are included in a combined report and intercompany transactions between group members are eliminated. Other States have enacted systems under which each corporation

must file a separate state return regardless whether the corporation files a consolidated federal return. *See e.g.,* Maryland (Md. Code Ann. Tax-Gen. § 10-811); Pennsylvania (72 P.S. § 7404).

Massachusetts, as is its right, has adopted a state taxing regime that imposes corporate income tax liability on a "separate company" basis.[8] A direct consequence of that policy choice is the requirement that Massachusetts must recognize the separate existence of individual corporations and the transactions between them. Thus, during the years at issue, TRUMI and Baby Superstores filed "separate company" tax returns where they calculated Massachusetts taxable income based on their separate company financial results as required by Massachusetts law. Mass. Gen. Laws ch. 63, § 32B (2008).

Having established its tax system, Massachusetts cannot pick and choose whether to respect certain transactions or entities – or to disregard *Complete Auto Transit*'s substantial nexus requirements – simply because it does not like the results. A different tax policy choice – one requiring a combined return for all members of a unitary group – would have yielded a different result. But that is not the choice Massachusetts made.[9]

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[8] *See* Massachusetts Department of Revenue, Technical Information Release No. 08-11 (August 15, 2008). Under the separate reporting regime in place during the periods at issue in this case, however, "each corporation with nexus files a tax return that includes only the separately-determined income and apportionment factors of that corporation." Massachusetts Department of Revenue, Technical. *Id.*

[9] Massachusetts has since moved to a corporate excise tax system that requires affiliated groups of unitary corporations to file a combined excise tax return. *See* Massachusetts De-

In an earlier case involving a similar fact pattern, the Massachusetts Supreme Judicial Court recognized that "our tax system is a rule-based system, objective in nature, that places principal importance on what taxpayers do and the economic consequences attached to those actions, not on what may have subjectively motivated them to act in the first place." *Sherwin-Williams Co. v. Commissioner of Revenue*, 778 N.E.2d 504, 514 (Mass. 2002). In that case, the court upheld the deductions of a Massachusetts taxpayer for royalties paid to a non-Massachusetts entity for the use of intangible property in Massachusetts against allegations by the Massachusetts Department of Revenue that the transactions should be disregarded as sham transactions. Such an argument would not have been necessary if the licensor had nexus in Massachusetts.

In 2008, the Massachusetts legislature passed legislation requiring all members of a unitary group of affiliated corporations to file a single combined corporate excise tax return. Mass. Gen. Laws ch. 63, § 32B (effective January 1, 2009). The unitary group also includes entities that do not have nexus in Massachusetts. All transactions between members of the group are eliminated in the calculation of the group's Massachusetts taxable income. Massachusetts Department of Revenue, Technical Information Release No. 08-11 (August 15, 2008). Thus, the legislature in Massachusetts has acted to establish a constitutionally sound taxing system that eliminates the transactions between affiliated in-state licensees and out-of-state licensors. That it did not do so earlier is no basis for upending the physical presence test.

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partment of Revenue, Technical Information Release No. 08-11 (August 15, 2008).

## IV. ABANDONING THE BRIGHT-LINE PHYSICAL PRESENCE TEST WOULD SPAWN A STANDARDLESS MORASS OF STATE NEXUS RULES, THEREBY UNDERMINING THE FUNDAMENTAL PURPOSE OF THE COMMERCE CLAUSE

The Massachusetts court's elastic economic nexus standard is so amorphous that it robs taxpayers of the certainty promised by *National Bellas Hess* and *Quill* and grants license to States to tax at will because a business's "defense" of a particular nexus-causing factor cited by the State would be met by the creation of yet another one. For example, could the mere licensing of software to residents of a State, without more, subject an out-of-state business to an income tax payment obligation?[10] Could cashing a check drawn on an in-state bank, without more, satisfy the Commerce Clause? Would the answer be any different if the out-of-state business engaged in direct solicitation of in-state customers? Or if it engaged in business only through advertisements in general circulation periodicals? Or if its television or radio advertising originated outside the State?[11]

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[10] The Iowa Department of Revenue has promulgated a regulation providing that licensing software to businesses located in Iowa creates nexus in the State. *See* 701 I.A.C. § 52.1(4), Example 7. *See also* Iowa Department of Revenue, Policy Letter 08240032 (May 14, 2008).

[11] In Wisconsin, the legislature recently enacted legislation expanding the definition of nexus to include:

> regularly soliciting business from potential customers in this state; regularly performing services outside this state for which the benefits are received in this state; regularly engaging in transactions with customers in this state that involve intangible property and result in receipts flowing to the taxpayer from within this state; holding loans se-

Undoubtedly, the Massachusetts Department of Revenue would point to the State's statutory definitions of "doing business" in the Commonwealth as the starting point. The question, however, is not whether the States choose to tax such activity but whether the Constitution permits such a tax. *Amicus* TEI submits that the "substantial economic presence" test crafted by the Massachusetts court is more pernicious than the "slightest presence" test that this Court properly rejected in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 556 (1977). After all, in *National Geographic* the business had some physical presence in the State, albeit unconnected with the transactions giving rise to the use tax obligation. Here, there is nothing but conjured presence and trumped-up nexus.

Stated simply, abandoning the bright-line test of *National Bellas Hess* and *Quill* could leave the States free to wield "economic presence" as a shibboleth to eviscerate the Commerce Clause's nexus requirement. The scope and meaning of the term "nexus" would change from case to case, to suit the needs, wants, and wishes of the taxing jurisdiction.[12] And, it would provide no guidance to taxpayers or tax administrators, and thus would guarantee, not the

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cured by real or tangible personal property located in this state.

Wis. Stat. § 71.22(1r) (effective January 1, 2009).

[12] In other words, the nexus requirement would become little more than the word "glory" in *Through the Looking Glass*: meaning whatever the States, like Humpty Dumpty, say it means. *See* Lewis Carroll, *Through the Looking Glass*, 186 (Signet Classic 1960) ("'When *I* use a word ['glory']," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."').

free flow of commerce, but only contention and dispute. There would be no stability. There would be no predictability. There would be no free flow of commerce. And the fundamental purpose of the Commerce Clause – ensuring free trade among the States – would consequently be undermined.

The lower court identified "intangible property" within the State generating income for the taxpayer as justifying its conclusion, but in fact, Geoffrey itself engaged in no business activity within Massachusetts. Indeed, the lower court's standard is so broad that it would sweep an extraordinary amount of out-of-state businesses within its taxing net. Consider what would give rise to tax and who would be taxable under the lower court's analysis. Every sale of a Mickey Mouse T-shirt, a personal computer with Microsoft's Windows software installed and "Intel inside," or every iPod with downloaded music would give rise to a royalty or licensing fee subject to tax. To avoid being caught in this expansive net, Geoffrey would need to instruct children to refrain from mentioning that they "want to be a Toys "R" Us kid." Indeed, whenever one person's intangible property (be it a copyright, trademark, trade name, patent, or some similar property) was used by others, the person would be subject to tax and – to the attendant filing and compliance costs – where the property was used, regardless of whether the person had any say in the matter.

The Massachusetts court's jurisdictional alchemy would massively expand the obligation of taxpayers to comply with a plethora of state tax filing obligations. Businesses that received income from other persons' use of their intangible property would have to monitor where such property was used, determine

what part of the income derived from such use was attributable to which jurisdiction, research the tax consequences of such use in each jurisdiction, and then undertake to comply. They would likely have to revise their licensing agreements, change their accounting systems to capture the necessary information, and set in place procedures to ensure compliance with myriad filing and reporting requirements. None of these tasks would be easy, and none would be cheap. The burden of uncertainty, exacerbated by the cost of good faith compliance efforts, could not help but act as an "unreasonable clog upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 527 (1935).

It was concerns with administrative costs and burdens that informed the Court's Commerce Clause analysis in *Quill* and in *National Bellas Hess*, and such concerns that led the Court to affirm the vitality of the physical-presence test in respect of sales and use tax. Such concerns, regrettably, were lost on the court below. A writ of certiorari should be issued to remedy that shortcoming by confirming the application of a bright-line, physical presence test to income tax cases.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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